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Supreme Court, U.S.
FILED
NOV 7 1997
CLERK

No. 97-532

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PACESETTER CONSTRUCTION COMPANY, INC.,
Petitioner,
v.
CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

VICTOR J. VAN BOURG
MICHAEL B. ROGER
Counsel of Record
SANDRA RAE BENSON
JAMES J. WESSER
KEVIN E. NOLT
VAN BOURG, WEINBERG, ROGER & ROSENFELD
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600
Attorneys for Respondent

November 7, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

33 pp

QUESTIONS PRESENTED

1. Whether this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L.Ed.2d 985, 115 S.Ct. 1920 (1995), is in direct conflict with the decision of the Ninth Circuit in this case which held that *First Options* does not apply to disputes arising under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), as amended.

2. Whether the decision of the Ninth Circuit in this case creates a conflict among the circuits regarding the applicability of *First Options* to cases arising under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), as amended.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Pacesetter Construction Company, Inc. ("Pacesetter") has not presented any new issue or matter of importance for this Court to consider. There are no conflicts between the Ninth Circuit and this Court, nor any conflicts among the circuits, that should occupy the scarce resources and time of the Supreme Court. In *Pacesetter Construction Company, Inc. v. Carpenters 46 Northern California Counties Conference Board*, 116 F.3d 436 (9th Cir. 1997) the Ninth Circuit was correct in ruling that *First Options* should not apply to labor arbitration, thus re-confirming the arbitral award, and its decision must be upheld.

Pacesetter has blatantly misled this Court in its Petition as well as the courts below by asserting that it "repeatedly objected to the arbitrability of the Union's grievance on the ground that it was not a party to the contract with the Union." (Petitioner's Statement of the Case at pg. 4). This claim directly contradicts the statements made by Pacesetter at the Board of Adjustment hearing and has been repeatedly rejected by both the District Court and the Circuit Court. There can be no question that Pacesetter recognized the jurisdiction of the Board of Adjustment ("Board" or "Arbitrator") and fully participated in the proceedings, including the presentation of evidence and argument. The undisputable facts established that Pacesetter clearly and unmistakably agreed to submit the dispute to the Arbitrator. Thus, the requirements of *First Options* are met. Therefore, even if it is determined that *First Options* applies to labor arbitration, Pacesetter is still bound to the Arbitrator's decision on arbitrability and the award must be confirmed.

While the facts of the case do not embrace a conflict, the legal principles also do not conflict with this Court's decision in *First Options*. Relying, in part, on the implied consent doctrine set forth in *George Day Construction Company v. United Brotherhood of Carpenters*, 722 F.2d 1471 (9th Cir. 1984), the Ninth Circuit held that Pacesetter had consented to the Arbitrator's authority to decide the issue of arbitrability and therefore waived its right to court review of the arbitrability issue. The implied consent doctrine of *George Day* does not conflict with *First Options* and is consistent with the *Steelworkers Trilogy* and *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 89 L.Ed.2d 648, 106 S.Ct. 1415 (1986). Based on the special nature and purpose of labor arbitration, *Pacesetter* and *George Day* further define what constitutes clear and unmistakable evidence of an agreement to submit the issue of arbitrability to the arbitrator for determination. These Ninth Circuit decisions are also consistent with the other circuits that have addressed the issue.

Moreover, *First Options* should not impact the Ninth Circuit's decision below because *First Options* is a commercial arbitration case. Due to the fundamental differences between labor and commercial arbitration, commercial arbitration law should not be applied to labor arbitration cases if inconsistent with federal labor policy. Such a result is mandated by thirty years of Supreme Court and Federal Court of Appeals precedent. If *First Option* is applied to reverse the holding of the Ninth Circuit, the effectiveness of labor arbitration as a substitute for industrial strife will be severely weakened. Therefore, the Ninth Circuit's decision below does not conflict with *First Options*.

Finally, the Ninth Circuit held that *First Options* does not apply to cases that arise under section 301 of the Labor Management Relations Act. Since the Ninth Circuit is the only circuit to address or even reach this issue, there is not a conflict in the circuits regarding the applicability of *First Options* to the collective bargaining context.

REASONS FOR DENYING THE WRIT

Respondent Carpenters 46 Northern California Counties Conference Board ("Union") respectfully requests that this Court deny the Petition for Writ of Certiorari. The decision below is not in conflict with *First Options* or any other decision of any other circuit. Because Pacesetter expressly consented to the jurisdiction of the Board of Adjustment, it waived its right to independent judicial review of the arbitrability issue. The Ninth Circuit was therefore correct in affirming the judgment of the District Court confirming the arbitration award.

I. THE NINTH CIRCUIT'S OPINION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *FIRST OPTIONS*.

A. There Is No Conflict Because Pacesetter Expressly Consented To The Arbitrator's Jurisdiction.

Pacesetter has blatantly misled this Court in its Petition by asserting that it "repeatedly objected to the arbitrability of the Union's grievance on the ground that it was not a party to the contract with the Union." (Petitioner's Statement of the Case at pg. 4.) Pacesetter did not object to the Arbitrator's authority to decide whether it was a party to the contract with the Union. In fact, the record of the arbitration proceeding proves that Pacesetter sought and expressly consented to the Arbitrator's jurisdiction.

At the Board of Adjustment hearing on January 14, 1992, (the "arbitration" at issue in this case), Pacesetter acknowledged the jurisdiction of the Board to decide the issue of arbitrability before submitting the issue to the Board for decision. Pacesetter stated that the Board "already has jurisdiction over Pacesetter Construction by virtue of arbitration that occurred under the very document that the Union claims creates a contract, namely the 1974 collective bargaining agreement." (Petitioner's Appendix ("Appendix") at pg. 26a, citing to the transcript of the grievance procedures). The Ninth Circuit found that Pacesetter's "posture before the Board of Adjustment leaves it in poor position that it never consented to the Board's deciding the issue of arbitrability." (Appendix at pg. 13a). The Ninth Circuit noted that in disposing of Pacesetter's original appeal it had relied on *George Day* by holding that Pacesetter consented to the Board's jurisdiction by arguing the issue of arbitrability without preserving its objection to jurisdiction. (Appendix at pg. 13a) However, the Ninth Circuit found an additional reason to confirm the arbitration award by holding that Pacesetter did more than argue arbitrability, "it repeatedly asserted that the Board's jurisdiction stemmed

from its original jurisdiction over the 1981 grievance, and that the 1981 decision of the Board remained in effect and controlled the 1991 proceeding." (Appendix at pg. 13a) The Ninth Circuit noted that Pacesetter's counsel engaged in the following colloquy with the Arbitrator which manifested Pacesetter's consent to the Arbitrator's authority to decide the dispute.

> Mr. Schaffer: [W]e're appearing here because we believe you already had jurisdiction of this '81 grievance. That's why we didn't say there's no jurisdiction, go to court, et cetera. There's a previous decision and we're saying that was decided and it's final and it's binding on the panel. And it's binding on the local union.
>
> [Arbitrator]: In effect what you're—can I characterize your motion that you have just made, the last one, as being a special appearance then at this point?
>
> Mr. Schaffer: Well, we're not certain a special appearance is proper because the panel already has jurisdiction over Pacesetter Construction by virtue of an arbitration that occurred under the very document that the union claims creates a contract, namely the '74 document, '74 me too agreement. And there's an arbitral award on that. So that if we appeared here, we can't specially appear now when that proceeding is *res judicata* on this panel and this union.

(Appendix at pg. 14a, citing to the transcript of the grievance procedure). In light of this exchange, the Ninth Circuit concluded that Pacesetter did more than simply argue arbitrability. Pacesetter repeatedly asserted the Board's jurisdiction, and thereby consented to the Arbitrator's authority to decide the dispute. Moreover, the Ninth Circuit distinguished *First Options* by stating that unlike Pacesetter, the Kaplans in *First Options* "made clear" that they did not want the arbitrator to exercise jurisdiction over the dispute. (Appendix at pg. 14a)

Pacesetter's conduct surpasses the implied consent doctrine set forth in *George Day* because Pacesetter expressly

consented to the Arbitrator's jurisdiction. Furthermore, even if the holding of *First Option*s applies to labor arbitration, Pacesetter is still bound by the arbitration award because its conduct also meets the standards set forth in *First Options*. In *First Options*, this Court stated that "the court should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options*, 131 L.Ed.2d at 994 (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649). This Court then held that the Kaplans did not consent to the arbitrator's authority and stated that merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue. *Id.* Here, Pacesetter expressly stated that the Arbitrator had jurisdiction to decide the dispute and refused to make a special appearance. There can be no doubt, that based upon the position taken by Pacesetter as set forth in the record, that Pacesetter was aware of its right to go to court, was aware of the issue of the existence of the collective bargaining agreement and its effect on the question of the Board's jurisdiction to decide the question of arbitrability. Nevertheless, Pacesetter, confident in its *res judicata* theory, rejected the invitation to make a special appearance, and by its unequivocal position, consented, and agreed to a decision by the Board of Adjustment on the issue of the arbitrability of the dispute. Therefore, even under the commercial context of *First Options*, the record of the Arbitration proceeding provides clear and unmistakable evidence of Pacesetter's agreement to arbitrate the question of arbitrability.

The facts of this case do not embrace the purported conflict that Pacesetter alleges exists between the Ninth Circuit's decision below and *First Options*. Pacesetter clearly consented to the Arbitrator's authority and under *George Day, AT & T Technologies* and *First Options*, Pacesetter is clearly bound by the Arbitrator's award. Therefore, a substantial question warranting Supreme

Court review does not exist and the Union requests that this Court deny Pacesetter's Petition.

B. There Is No Conflict Because *First Options* Is A Commercial Arbitration Case Decided Under The Federal Arbitration Act.

Pacesetter asserts that there are no fundamental differences between commercial and labor arbitration which justify the Ninth Circuit's determination that *First Option* does not apply to cases that arise under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"). As set forth below, Pacesetter's position contradicts over 30 years of Supreme Court and Federal Court of Appeals precedent.

Pacesetter fails to recognize that the Ninth Circuit in the decision below refused to apply *First Options* to the collective bargaining context, in particular to reverse the implied consent doctrine of *George Day*, because to do so would be inconsistent with federal labor policy. (Appendix at pg. 13a) *Pacesetter* and *George Day* were decided in the collective bargaining context and federal labor policy mandated the holdings of each case. *First Options*, as a commercial arbitration case based primarily on state contract law principles, must not disturb these decisions because to do so would undermine the effectiveness of labor arbitration and of collective bargaining. Whether the Federal Arbitration Act ("FAA") currently favors arbitration in the commercial context is irrelevant because labor and commercial arbitration are still fundamentally different.

1. *Fundamental Differences Between Labor And Commercial Arbitration Require That* First Options *Should Not Apply To Labor Arbitration.*

Well settled legal precedent has established that commercial arbitration law is inapposite to labor arbitration if inconsistent with the precepts of federal labor policy. *See, United Steelworkers v. Warrior & Gulf Navigation*

Co., 363 U.S. 574, 4 L.Ed.2d 1409, 80 S.Ct. 1347 (1960); *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d 1200 (9th Cir. 1989) (*en banc*) *cert. denied*, 495 U.S. 946, 109 L.Ed.2d 531 (1990). By seeking to expand the scope of *First Options* into the unique realm of labor arbitration, Pacesetter jeopardizes the role labor arbitration plays as the preferred method of resolving labor disputes.

The public policy favoring arbitration of labor disputes as the preferred method for achievement of industrial peace was authoritatively and emphatically established in the *Steelworkers Trilogy*. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 4 L.Ed.2d 1403, 80 S.Ct. 1343 (1960); *United Steelworkers v. Warrior & Gulf Navigaiton Co.*, 363 U.S. 574, 4 L.Ed.2d 1409, 80 S.Ct. 1347 (1960); and *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1358 (1960). In the examination and application of federal policy, courts have drawn crucial distinctions between commercial and labor arbitration which establish that each serves a different purpose. The origin of distinctions between labor and commercial arbitration lies in the doctrine that in the labor context, pursuant to section 301 of the LMRA, courts are to fashion a body of federal law from the policy of our national labor laws. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456, 1 L.Ed.2d 972, 980, 77 S.Ct. 912, 920 (1957). Because courts must consider federal labor policy when rendering a decision in a labor arbitration case and not in a commercial arbitration case, differences in the treatment of labor and commercial arbitration are both inevitable and necessary.

Considering federal labor policy, this Court drew crucial distinctions between labor and commercial arbitration. This Court in considering the level of judicial deference which should be given to an arbitrator's decision in a labor arbitration case stated the following:

> In the commercial arbitration case, arbitration is a substitute for litigation. Here arbitration is a substitute for industrial strife. Since arbitration of a labor dispute has quite different functions from arbitration under an ordinary commercial agreement, the hostility evidenced by the courts towards arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Warrior & Gulf Navigation Co., 362 U.S. at 578. This language evidences the crucial role labor arbitration plays in the collective bargaining process and in maintaining industrial peace. Due to these differences between labor and commercial arbitration, this Court has expressly held that the holdings of commercial arbitration cases, at least when hostile to collective bargaining, are "irrelevant" to labor arbitration cases. *Id.*

This Court further elaborated on the distinctions between commercial and labor arbitration in *Gateway Coal Company v. United Mineworkers of America*, 414 U.S. 368, 38 L.Ed.2d 583, 94 S.Ct. 629 (1974). In holding that the dispute was arbitrable under the broad arbitration clause of the agreement, this Court stated:

> A collective bargaining agreement cannot define every minute aspect of the complex and continuing relationship between the parties. Arbitration provides a method for resolving the unforeseen disagreements that inevitably arise. And in resolving such disputes, a labor arbitrator necessarily and appropriately has resort to considerations foreign to courts.

Gateway Coal, 414 U.S. at 378.

Similarly, the Ninth Circuit examined the differences between labor and commercial arbitration in *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d 1200 (9th Cir. 1989) (*en banc*) *cert. denied*, 495 U.S. 946, 109 L.Ed.2d 531 (1990). While emphasizing that arbi-

tration of labor disputes "is an essential feature of the collective bargaining process . . . maintaining equity and a balance of power in the workplace", the Ninth Circuit stated that the arbitrator, in the labor context, serves a function different from that served by the arbitrator in the commercial context. *Id.*, at 1205. Unlike the commercial arbitrator, the labor arbitrator does not merely provide an alternative means of dispute resolution but also acts as the parties' surrogate. *Id.* Due to these differences, the Ninth Circuit stated that judicial scrutiny of a labor arbitrator's decision is much more limited because it shall be upheld as long as it draws its "essence" from the collective bargaining agreement. *Id.* at 1208, *citing Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

Due to the fundamental differences between commercial and labor arbitration and following *Stead Motors* and the *Steelworkers Trilogy*, the Ninth Circuit held that commercial arbitration law shall not be applied in the collective bargaining context if inconsistent with federal labor policy. *United Brotherhood of Carpenters and Joiners of America, Local No. 1780 v. Desert Palace*, 94 F.3d 1308, 1312 (9th Cir. 1996). The Ninth Circuit's rationale, in part, was that the policy concerns expressed in *First Options* do not come into play in the collective bargaining context. *Id.* at 1311. Asserting that there are fundamental differences between commercial and labor arbitration which make the application of *First Options* inappropriate, the Ninth Circuit stated the following:

> Unlike parties in the commercial arbitration context, parties entering into a collective bargaining agreement know they are granting the arbitrator tremendous power to define and "fill in the gaps" of their agreement. In the collective bargaining context, the issue of who gets to decide arbitrability is not an "arcane" question the parties do not think about. By entering into a collective bargaining agreement, the parties know they will get an arbitrator rather than the courts to decide any labor dispute that arises

> under their collective bargaining agreement, including a dispute over arbitrability.

Id., at 1311.

The distinguishing features of labor arbitration which mandate different treatment from commercial arbitration have been noted by the other circuits. *See, e.g., Harry Hoffman Printing, Inc. v. Graphic Communications International Union, Loal 261*, 950 F.2d 95, 98 (2nd Cir. 1991) (for purposes of avoiding industrial strife, settled national policy holds that voluntary arbitration under a collective bargaining agreement is the preferred method of resolving disputes between labor and management); *Sterling Colorado Beef Co. v. United Food & Commercial Workers, Local Union No. 7*, 767 F.2d 718, 721 (10th Cir. 1985) (the arbitrator's source of law is not confined to the express provisions of the collective bargaining agreement but rather the practices of the industry and the shop are equally a part of the collective bargaining agreement although not expressed in it.); and *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997) *petition for cert. filed 8/6/97* (In labor arbitration, the arbitrator is the protector of the bargain, and his task is to effectuate the intent of the parties while in the commercial context, the arbitrator provides a forum for the vindication of public rights.).

Labor and commercial arbitration also differ because they are governed by different statutes. Since the FAA, 9 U.S.C., *et seq.*, excludes "contracts of employment" from its coverage, the FAA does not apply to collective bargaining agreements. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9, 98 L.Ed.2d 286, 300 n.9, 108 S.Ct. 364, 378 n.9 (1987); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997); *Glass Molders, Pottery, Plastic and Allied Workers, International Union, Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 848 (8th Cir. 1995); *San Diego County Dist. Council v. Cory*, 685 F.2d 1137,

1141 (9th Cir. 1982); *American Postal Workers Union v. U.S. Postal Service*, 823 F.2d 466, 469-473 (11th Cir. 1987). As a result, commercial arbitration is governed by the FAA while labor arbitration is governed by the LMRA and federal common law derived from federal labor policy.

The fact that labor and commercial arbitration are governed by different statutes has played a part in the refusal by some courts to apply commercial arbitration law in the collective bargaining context. In *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 114 L.Ed.2d 26, 111 S.Ct. 1647 (1991), this Court suggested that commercial cases governed by the FAA should not impact labor arbitration law. In *Gilmer*, this Court held that compulsory arbitration provisions could preclude judicial resolution of employment discrimination claims. Rather than overrule a line of labor arbitration cases, including *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974), which held that compulsory arbitration provisions in collective bargaining agreements did not preclude judicial resolution of statutory claims, the Court distinguished these cases. In distinguishing the labor arbitration cases, the Court stated that those cases occurred in the context of a collective bargaining agreement and were not decided under the FAA. Therefore, *Gilmer's* analysis suggests that commercial arbitration law does not apply to labor arbitration cases if inconsistent with federal labor policy.

The circuits have followed this Court's suggestion that cases decided under the FAA should not impact labor arbitration. *See, e.g. Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997). In *Harrison*, the Tenth Circuit notes that a majority of the circuits have refused to apply *Gilmer* to the collective bargaining context and have held that *Alexander v. Gardner-Denver Co.* remains good law.

Since courts deciding a labor arbitration case must consider federal labor policy and the distinctions between labor and commercial arbitration, it therefore follows that *First Options* should not impact the Ninth Circuit's decision below. *First Options* was a commercial arbitration case involving demands for payment by a firm dealing with the trading of securities. Since *First Options* involved commercial arbitration, this Court, in rendering that decison, did not take federal labor policy into consideration. Specifically, it was not necessary for this Court to consider the fundamental differences between labor and commercial arbitration. This Court did not consider that the stakes are much greater in labor arbitration. While the failure of commercial arbitration would result in more litigation, the failure of labor arbitration would result in a breakdown in the collective bargaining process and would lead to an increase in work stoppages, loss of production and other related industrial strife. This Court also did not consider that the parties to a collective bargaining agreement often have more equality of bargaining power than the parties to a commercial contract. Since federal labor policy was not considered and the distinctions not recognized, the holding of *First Options* must not apply to the Ninth Circuit's decision below.

Pacesetter dangerously assumes that because *First Options* cites a few fundamental labor arbitration cases this Court must have intended for *First Options* to apply in the collective bargaining context. *First Options* merely relies upon *AT&T Technologies*, 475 U.S. 574 and *Warrior & Gulf Navigation Co.*, 363 U.S. 593, for the rule that the issue of arbitrability is for the courts to decide unless there is an agreement to the contrary. *First Options*, 131 L.Ed.2d 985, 994. This is an established rule of law in both the labor and commercial context, was not in dispute in *First Options*, and is not in dispute in this case. While labor arbitration is a unique creature and the law that governs the process must take into

account federal labor policy, commercial arbitration is not subject to such considerations. It therefore follows that commercial arbitration cases may rely on labor arbitration law, but labor arbitration cases must not rely on commercial arbitration law that is inconsistent with federal labor policy. Pacesetter cites *Three Valleys Mun. Water Dist. v. E.F. Hutton*, 925 F.2d 1136 (9th Cir. 1991), *Painewebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996) and *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) in support of its argument that there are no distinctions between commercial and labor arbitration because these commercial arbitration cases cite labor precedent. However, the use of labor precedent in commercial arbitration cases does not indicate that the unique nature of labor arbitration should be subject to commercial arbitration law.

Moreover, although *First Options* cites two labor arbitration cases, it primarily relies on commercial arbitration cases and the rationale and purpose behind the FAA. For example, the beginning of the *First Options* decision sets forth that this Court was deciding "two questions about how courts should review certain matters under the federal Arbitration Act." *First Options*, 131 L.Ed.2d 985, 991. This Court, relying on numerous commercial arbitration cases, also stated that "the basic objective in this area . . . is to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." *Id.* at 995. In addition, this Court cited the principle that the purpose of the FAA is "to ensure judicial enforcement of privately made agreements to arbitrate." *Id.*, at 994. Finally, this Court relied heavily on the fact that there is no strong arbitration-related policy in the commercial context relating to the issue of who has the primary authority to decide arbitrability. *Id.*, at 995. The language of this Court evidences that it was concerned with the policies underlying commercial arbitration and further invalidates Pacesetter's unfounded assumption

that this Court intended *First Options* to apply to labor arbitration.

Having no reason to consider federal labor policy and the distinctions between labor and commercial arbitration, this Court implicitly limited the holding of *First Options* to commercial arbitration cases. This Court must not follow the dangerous path of applying commercial arbitration law to labor arbitration cases because such application would be inconsistent with the federal labor policy favoring arbitration as the preferred method of solving labor disputes and would weaken the collective bargaining process.

2. First Options *Must Not Apply To Labor Arbitration Because It Is Inconsistent With Federal Labor Policy.*

As set forth above, the fundamental differences between labor and commercial arbitration require that commercial arbitration law should not apply to labor arbitration if inconsistent with federal labor policy. Pursuant to *First Options*, arbitration awards in favor of unions could be set aside if the employer asserts some ambiguity in the record as to its position regarding the question of arbitrability. This decision would essentially allow an employer a second bite at the apple, undermining the purpose of binding arbitration. The employer could participate in a speedy and inexpensive arbitration proceeding pursuant to the collective bargaining agreement and when faced with an unfavorable decision, the employer could rely on its intentionally ambiguous position regarding the question of arbitrability and seek to have the decision set aside in court.

While this result would have minimal impact in the commercial setting, it would have a substantial impact in the labor context because it would result in the subversion of collective bargaining processes and grievance resolution. Labor arbitration would essentially become the employer's tool to save money and to test the waters.

It would render binding arbitration agreements meaningless if employers could escape the binding effect by inserting some ambiguity in the record as to its position on arbitrability. Unions would lose faith in the use of arbitration as a means of settling disputes, reducing the use of anti-strike clauses in collective bargaining agreements. This would lead to an increase in industrial strife. In addition, application of the holding of *First Options* to labor arbitration cases would flood the courts with cases that were properly resolved by an arbitrator. These results are clearly at odds with federal labor policy which aims at industrial peace through the use of labor arbitration. Consideration of federal labor policy requires that *First Options* not apply to this case because its holding is inconsistent with the federal interest in fostering the collective bargaining process.

C. There Is No Conflict Because The Implied Consent Doctrine Is Consistent With *First Options*.

In the decision below, the Ninth Circuit relied in part on the implied consent doctrine of *George Day* in finding that Pacesetter had consented to the jurisdiction of the arbitrator. (Appendix at pg. 13a) In relying on *George Day*, the Ninth Circuit has re-affirmed the principle that consent to grant the arbitrator authority to decide the arbitrability of a dispute arising under a collective bargaining agreement may be implied from the conduct of the parties in the arbitration setting. (Appendix at pg. 13a)

In *George Day*, the Ninth Circuit held that the employer by his conduct evinced clearly its intent to allow the arbitrator to decide not only the merits in dispute but also the question of arbitrability. *George Day*, 722 F.2d at 1475, citing *International Brotherhood of Teamsters, Local 117 v. Washington Employers, Inc.*, 557 F.2d at 1350; and *Ficek v. Southern Pacific Co.*, 338 F.2d at 656-657. Consent was implied by the employer's conduct because the arbitrability issue was argued along with

the merits, the case including the arbitrability issue was voluntarily submitted to the arbitrator for decision, and the employer did not evidence any intent to reserve its right to independent judicial review of the arbitrability issue. *George Day*, 722 F.2d at 1475.

This implied consent doctrine is consistent with *First Options*. Under *First Options*, a party's conduct at the arbitration that clearly demonstrates his or her intent to grant the arbitrator the authority to decide the question of arbirability, constitutes "clear and unmistakable" evidence of an agreement to arbitrate arbitrability. The holding of *First Options* does not preclude a court from finding that a party consented by its conduct to the arbitrator's jurisdiction. Such conduct by an employer would not constitute the silence or ambiguity about the question of who decides arbitrability that concerned this Court in *First Options*. Furthermore, *George Day* is also consistent with the statement in *First Options* that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue." *First Options*, 131 L.Ed.2d at 994. Under *George Day*, merely arguing the arbitrability issue to an arbitrator does not indicate consent to the arbitrator's authority as long as the employer engages in some conduct which evidences his or her intent to seek independent judicial review of the issue.

George Day and the decision below further define what constitutes clear and unmistakable evidence of an agreement to have the arbitrator decide the issue of arbitrability and thus are consistent with *First Options*. Therefore, there is no conflict worthy of Supreme Court review and the Union requests that Pacesetter's Petition be denied.

II. THERE IS NO SPLIT AMONG THE CIRCUITS OVER THE APPLICATION OF *FIRST OPTIONS* TO CASES ARISING UNDER SECTION 301 OF THE LMRA.

Pacesetter seeks to create a conflict among the circuits regarding the applicability of *First Options* to cases arising under section 301 of the LMRA. Pacesetter has mischaracterized the law of the circuits in an attempt to create a conflict where one does not exist.

The Ninth Circuit is the *only* circuit that has addressed whether *First Options,* as a commercial arbitration case, should apply to cases that arise under section 301 of the LMRA. In *Desert Palace*, 94 F.3d 1308, the Ninth Circuit held that *First Options* should not apply to labor arbitration because of the fundamentally different policy concerns that govern labor arbitration. In *Desert Palace,* the Court re-affirmed the labor doctrine that a broad arbitration clause grants the arbitrator authority to decide his or her own jurisdiction. The Court then held that its conclusion is "not affected by the Supreme Court's recent decision in *First Option.*" *Desert Palace,* 94 F.3d at 1309. The Court noted that *First Options* relied on commercial arbitration policies that "do not come into play" in the collective bargaining context and discussed the fundamental differences between labor arbitration and commercial arbitration. Finally, the Court stated that "to extend *First Options* to the collective bargaining context would contravene the intention of parties who have entered into collective bargaining agreements, weaken the power of arbitrators in resolving labor disputes, and undermine the effectiveness of arbitration in maintaining industrial peace." *Desert Place,* 94 F.3d at 1310.

Following *Desert Palace,* the Ninth Circuit, in the decision below, similarly held that "it is not appropriate to transfer wholesale the rationale of *First Options* to the collective bargaining context." (Appendix, at pg. 11a)

Applying the rationale of *Desert Palace*, the Court stated the following:

> Pacesetter was a party to the Agreement, however. The only question is whether it had effectively repudiated it. Once the Agreement was in effect, all of *Desert Palace's* policy reasons for arbitrating disputes between the parties to labor disputes came into play, and applied as well to the contested issue of repudiation. Especially was this so when Pacesetter argued the issue of repudiation to the arbitrator. . . . Because of the policy considerations set forth in *Desert Palace* and discussed above, we conclude that *George Day* survives *First Options* and controls this case.

Desert Palace, 94 F.3d at 1309.

No other circuit has decided, or even addressed the issue of whether *First Options*, as a commercial arbitration case, applies to cases that arise under section 301 of the LMRA. Pacesetter cites three cases from other circuits in an attempt to create a conflict. However, each of these cases cite *First Options* for a general principle applicable in both the labor and commercial context and not at issue in this case.

In *Aircraft Braking Systems Corp. v. Local 856, UAW*, 97 F.3d 155 (6th Cir. 1996), *cert. den.*, —— U.S. ——, 137 L.Ed.2d 475, 117 S.Ct. 1311 (1997), the Sixth Circuit cites *First Options* for the general proposition that courts should not assume that the parties have agreed to arbitrate the question whether there is a valid agreement to arbitrate without clear and unmistakable evidence that the parties so intended. 97 F.3d at 160, citing *First Options*, 131 L.Ed.2d at 984. This same general principle was first announced in *AT&T Technologies*, 475 U.S. 673, 649, and was subsequently adopted by commercial arbitration cases. *Aircraft Braking* merely cites First *Options* as the most recent case which re-affirms this general principle. Moreover, the Sixth Circuit did not cite

First Options for a proposition inconsistent with federal labor policy. The Sixth Circuit merely held that because the employer protested the arbitrator's authority at the outset of the arbitration, the parties in that case had not "clearly and unmistakably" agreed to submit the arbitrability issue to the arbitrator. *Aircraft Braking*, 97 F.3d at 160. The Sixth Circuit's use of *First Options* does not create a conflict in the circuits over the applicability of *First Options* to cases that arise under § 301 of the LMRA. Unlike the Ninth Circuit, the Sixth Circuit has not entertained or even reached the issue of whether *First Options*, as a commercial arbitration case, should apply in the collective bargaining context.

In addition, *Aircraft Braking's* facts are distinguishable from the facts of this case. In *Aircraft Braking*, the employer won at the arbitration level but then lost because the district court found that the parties did not submit the issue of arbitrability to the arbitrator. Thus, the employer, citing *First Options*, argued on appeal that it *did* submit the issue of arbitrability to the arbitrator. The Sixth Circuit noted that the employer protested at the outset of the arbitration and now argues that it submitted the issue to arbitration. *Aircraft Braking*, 97 F.3d at 161. The court further noted that if the employer would have lost in arbitration, it would now be arguing that it did not submit. *Id.* Because the employer "cannot have it both ways", the Sixth Circuit held that the parties did not submit the issue of arbitrability to the arbitrator. *Id.*

The Sixth Circuit's position that an employer "cannot have it both ways" supports the Ninth Circuit's holding in the decision below. Pacesetter expressly consented to the arbitrator's jurisdiction, argued the merits of the dispute and submitted the issue to the arbitrator for determination. When Pacesetter lost at the arbitration level, it sought independent judicial review of the arbitrability issue. If Pacesetter would have won at the arbitration

level it would not have sought judicial review. The Ninth Circuit has therefore prevented Pacesetter from "having it both ways" and has acted in accordance with the Sixth Circuit's concerns.

Likewise, the Seventh Circuit in *Local 744, International Brotherhood of Teamsters v. Hinckley and Schmitt, Inc.*, 76 F.3d 162 (7th Cir. 1996), relies on *First Options* only for the general principle that the issue of arbitrability is for the courts to decide unless there is a clear and unmistakable agreement to the contrary. Therefore, the Seventh Circuit's application of *First Options* does not create a conflict in the circuits over the application of *First Options.*

In addition, Pacesetter attempts to create a conflict with the Eighth Circuit due to *Excel Corp. v. United Food & Commercial Workers*, 102 F.3d 1464 (8th Cir. 1996) and a conflict within the Ninth Circuit itself due to *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 631 v. Silver State Disposal Service*, 109 F.3d 1409 (9th Cir. 1997). However, in both of these cases, the courts merely cite *First Options* for the appellate standard of review of district court decisions. These cases did not address the applicability of *First Options* to the collective bargaining context or even address the issue of who has primary authority to determine arbitrability. Pacesetter's attempt to use these cases to create a conflict among the circuits is therefore completely unfounded.

Finally, in *Abram Landau Real Estate and Woodland Realty Co. v. Gus Benova*, 123 F.3d 69 (2nd Cir. 1997) the Second Circuit refused to decide the issue of whether *First Options* is limited to the commercial context and does not apply to labor disputes. The Second Circuit stated the following:

> It is noteworthy that the Ninth Circuit recently held that *First Options* is limited to the commercial context and does not apply to labor disputes. *See United*

> *Brotherhood of Carpenters v. Desert Palace, Inc.*, 94 F.3d 1308 (9th Cir. 1996); *Pacesetter Construction Co., v. Carpenters 46 N. Cal. Counties Conference Board*, 1997 W.L. 345974 (9th Cir. June 25, 1997). The Ninth Circuit recognized that "there was no strong federal policy favoring arbitration of commercial disputes, while . . . there is a strong federal policy favoring arbitration of labor disputes . . ." *United Brotherhood*, 94 F.3d at 1311. The Supreme Court has also recognized that there is a strong presumption in favor of arbitrability in the labor context. *See AT&T Technology*, 475 U.S. at 650. We need not go as far as the Ninth Circuit, because even if *First Options* were extended to the labor context it would not apply to arbitrability questions involving the termination or expiration of the collective bargaining agreement.

Abram Landau, 123 F.3d at 72. The Second Circuit's refusal to address the issue of whether *First Options* applies in the collective bargaining context is further evidence that there is no conflict in the circuits.

Moreover, the Second Circuit has limited *First Options* to the single arbitrability issue of whether the parties *ever* entered into a valid arbitration agreement at all. *Id.*, at 70. In *Abram Landau*, the employer attempted to extend *First Options* to all questions of arbitrability, including whether an otherwise valid collective bargaining agreement has expired or been terminated. *Id.* The Second Circuit held that it would "not read *First Options* so expansively." *Id.* The Second Circuit's rationale was that the case did not raise the same concerns that led to the *First Options* holding because the case arose in a "scenario where the parties had a valid arbitration agreement and, in the language of *First Options*, 'gave at least some thought to the scope of arbitration.'" *Id.*, at 72. Since the parties were at one time bound to an arbitration agreement, the Second Circuit refused to apply *First Options* to reverse the presumption favoring the arbitration of disputes, including the issue of arbitrability.

Like the dispute in *Abram Landau*, the dispute in this case does not involve whether the parties ever entered into a valid arbitration agreement, but rather, involved whether Pacesetter had repudiated the contract. The parties do not dispute that Pacesetter was at one time bound to the collective bargaining agreement. Therefore, under the Second Circuit's holding in *Abram Landau*, *First Options* would not impact the Ninth Circuit's decision below.

Besides the insignificant cases cited by Pacesetter in its Petition, the Union is aware of no other labor arbitration cases which apply the holding or rationale of *First Options*. In fact, the rest of the cases which cite *First Options* are commercial arbitration cases governed by the FAA. The Second Circuit in *Painewebber, Inc. v. BYBYK*, 81 F.3d 1193 (2nd Cir. 1995), supports limiting *First Options* to commercial arbitration cases by confirming that *First Options* reverses the *"FAA's presumption"* in favor of arbitration when there is an ambiguity in the arbitration agreement as to who is to decide the issue of arbitrability. *Id.* at 1198 (emphasis added).

There is no conflict in the circuits regarding the applicability of *First Options* to cases that arise under § 301 of the LMRA. As stated above, the Ninth Circuit is the only circuit to have addressed this issue. Until another circuit decides whether *First Options* applies to the collective bargaining context in a manner that directly conflicts with the Ninth Circuit, there is no conflict among the circuits warranting Supreme Court review. Therefore, the Union requests that this Court deny Pacesetter's Petition.

III. THERE IS NO SPLIT AMONG THE CIRCUITS REGARDING WHO HAS THE PRIMARY AUTHORITY TO DECIDE ARBITRABILITY.

Pacesetter claims that the Third, Seventh, Sixth and Second Circuits are in conflict with the Ninth Circuit and Eighth Circuit (and by extension, with *AT&T Tech-*

nologies) over what is required to establish that a party agreed to have the arbitrator decide arbitrability and waive independent judicial review of the arbitrability issue. Specifically, Pacesetter asserts that the Ninth and the Eighth Circuits differ from the other circuits because they require a party that argues the issue of arbitrability to an arbitrator to also take affirmative steps to indicate that it also wishes to seek independent judicial review of the arbitrability issue. In doing so, Pacesetter seeks to overturn an entire line of cases going back to 1964 which hold that where a party submits its case to the arbitrator upon the merits, without reservation of the question of jurisdiction, the party has implied by its conduct its consent to the arbitrator's jurisdiction and has waived its right to subsequent judicial examination of the issue of arbitrability. *George Day*, 722 F.2d 1471 (9th Cir. 1984); *Interstate Brands v. Chauffeurs, Teamsters Local 135*, 909 F.2d 885 (6th Cir. 1990); *Franklin Electric Co. v. International Union, UAW*, 886 F.2d 188 (8th Cir. 1989); *Syufy Enterprises v. Northern California State Ass'n of IATSE Locals*, 631 F.2d 124 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *International Brotherhood of Teamsters, Local 117 v. Washington Employers, Inc.*, 557 F.2d 1345 (9th Cir. 1977); *Ficek v. Southern Pacific Co.*, 338 F.2d 655 (9th Cir. 1964); *Vic Wertz Distributing v. Teamsters Local 1038*, 898 F.2d 1136 (6th Cir. 1990).

From the Third Circuit, Pacesetter cites *Pennsylvania Power Co. v. Local Union No. 272 of IBEW*, 886 F.2d 46, 50 (3rd Cir. 1989) for the proposition that a party must "clearly indicate his willingness to forego judicial review." However, Pacesetter fails to cite the underlying premise of the *Pennsylvania Power* case that "where a party voluntarily submits an issue to arbitration without challenging the arbitrability of that issue, and where the merits are ruled upon by the arbitrator, that party may be deemed to have waived his right to judicial review of the arbitrability issue." *Id.* Indeed, even in the Third Circuit, the party must make an objection to the arbitrator's authority. Thus, in the Third Circuit, a party's con-

duct must indicate that it is not granting the arbitrator the authority to resolve the arbitrability issue and that it intends to seek judicial review of the arbitrability issue. The Third Circuit's position is therefore consistent with the Ninth and the Eighth Circuits.

Likewise, the Seventh Circuit is in accord with the Ninth and Eighth Circuits because it has held that "[i]f a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it." *International Ass'n of Machinists and Aerospace Workers, Lodge No. 1777 v. Fansteel, Inc.*, 900 F.2d 1005, 1009 (7th Cir. 1990), *cert. denied*, 498 U.S. 851 (1990), citing *Jones Dairy Farm v. Local No. P-1236 UFCW Int'l Union*, 670 F.2d 173, 175-176 (7th Cir. 1985). The holding of *Fansteel* is not affected by the Seventh Circuit's subsequent case *Local 744, International Brotherhood of Teamsters v. Hinckley & Schmitt, Inc.*, 76 F.3d 162 (7th Cir. 1996). As noted above, *Hinckley* merely cites *First Options* for the "clear and unmistakable" standard. Under *Hinckley*, a party that voluntarily submits the issue of arbitrability to the arbitrator without evidencing its intent to seek independent judicial review will be deemed to have consented to the arbitrator's jurisdiction. The Seventh Circuit is therefore in accord with the Ninth and Eighth Circuits.

In addition, the Sixth Circuit's decision in *Airport Braking* is consistent with the Ninth and Eighth Circuits. In *Aircraft Braking*, the employer protested against the arbitrator's authority to hear the dispute on the ground that there was no agreement on which the arbitrator could base its decision. Based on the employer's conduct, the court did not believe that the parties voluntarily submitted the arbitrability issue to the arbitrator. However, under *Aircraft Braking*, an employer who implies by its conduct that the arbitrator has authority by voluntarily submitting the issue of arbitrability to the arbitrator for decision without reserving its right to court review, will be found to have consented to the arbitrator's jurisdiction and waived their right to court review. Therefore, *Air-*

craft Braking does not conflict with the Ninth and Eighth Circuits.

Finally, Pacesetter fails to cite a Second Circuit case which would even potentially conflict with the Ninth and Eighth Circuits. Pacesetter merely cites *Torrington Co. v. Metal Products Workers Union, Local 1685, UAW*, 362 F.2d 677, 680-681 (2nd Cir. 1966), which involved whether the arbitrator had the authority to add to the terms of the collective bargaining agreement based on the parties' prior practice. *Torrington Co.* did not involve the issue of who has the primary authority to decide the issue of arbitrability and therefore does not support Pacesetter's theory that a conflict exists among the circuits.

Pacesetter has once again mischaracterized the facts of cases in an attempt to create a conflict in the circuits where one does not exist. The Second, Third, Sixth and Seventh Circuits are all in accord with the Ninth and Eighth Circuits over the issue who has the primary power to decide the issue of arbitrability. All of these circuits agree that the issue of arbitrability is for the courts to decide unless there is clear and unmistakable evidence to the contrary. In all these circuits, a party's conduct which evidences consent to grant the arbitrator jurisdiction will constitute clear and unmistakable evidence that the parties agreed to have the arbitrator determine arbitrability and waive judicial review. Therefore, there is no conflict among the circuits.

Furthermore, even if there is a conflict in the circuits, this case does not embrace this purported conflict because the facts evidence that Pacesetter *never objected* to the arbitrability of the grievance. As the Ninth Circuit found in the decision below, Pacesetter "repeatedly asserted" that the Board had jurisdiction over the grievance. The record demonstrates that Pacesetter wanted the arbitrator to resolve the matter and thus never objected to the arbitrator's authority. Since the facts of this case do not embrace the purported conflict, this case does not raise a substantial question warranting review by this Court.

CONCLUSION

Pacesetter has not presented any new issue or matter of importance for this Court to consider. There are no conflicts between the decisions of the Ninth Circuit and this Court, nor any conflicts among the circuits, warranting review by this Court.

The record proves that Pacesetter expressly consented to the Board's jurisdiction to decide the dispute. Pacesetter had the opportunity to object to the Board's jurisdiction and reserve its right to independent judicial review. However, Pacesetter, confident in its theories, sought the Board's determination of the dispute. Pursuant to federal labor policy, and Supreme Court and Federal Court of Appeals precedent, Pacesetter is bound to the decision of the Board and the Ninth Circuit was correct in affirming the judgment of the district court confirming the award of the Board.

Based upon the foregoing arguments and authorities, Carpenters 46 Northern California Counties Conference Board respectfully requests that this Court deny Pacesetter's Petition for Writ of Certiorari.

Respectfully submitted,

VICTOR J. VAN BOURG
MICHAEL B. ROGER
Counsel of Record
SANDRA RAE BENSON
JAMES J. WESSER
KEVIN E. NOLT
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600
Attorneys for Respondent

November 7, 1997